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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 256

ADELHEIT VON HARDENBERG AND
IRMGARD VON ALTEN,
Petitioners,

vs.

NICHOLAS DEB. KATZENBACH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MEMORANDUM OF RESPONDENT, THE NORTHERN TRUST COMPANY, ETC., IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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SCHIFF HARDIN WAITE DORSCHEL & BRITTON.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Northern Trust Company, as trustee of property held by it in trust under the Will of Louisa G. Bigelow, deceased, to which petitioners and the Attorney General of the United States have advanced conflicting adverse claims, occupies a role similar to that of a stakeholder. On April 30, 1964, The Northern Trust Company's report and accounting to the date of December 31, 1963, was approved by the trial court in its final decree (A. 168); and pursuant thereto all of the then remaining distributable

trust property (with the exception of that which is claimed adversely by the petitioners and the Attorney General) was distributed to the parties entitled thereto. It now appears that the last of a series of substantive questions concerning the rights of claimants to the *corpus* of the Bigelow Trust may soon be resolved by this Court's disposition of the petition before it.

As trustee, The Northern Trust Company neither supports nor opposes the petition, since the result will be no more than the relief which it prayed for in its original complaint, *viz.*, a determination and adjudication of "the interests and identities of the several parties who are presently entitled to share in the income, and, upon termination, in the principal of the Bigelow Trust." (A. 28.)

Respectfully submitted,

LESTER G. BRITTON,
W. DONALD MCSWEENEY,
Counsel for Respondent, The Northern Trust Company, As Trustee under the Will of Louisa G. Bigelow, deceased.

Of Counsel:
SCHIFF HARDIN WAITE DORSCHEL & BRITTON.

In the Supreme Court of the United States

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ADELHEIT VON HARDENBERG AND IRMGARD VON ALTEN, PETITIONERS

v.

NICHOLAS DEB. KATZENBACH, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Circuit Court of Cook County, Illinois, denying petitioners' motion for summary judgment without opinion, is unreported. The opinion of the Appellate Court of Illinois, First District (Pet. App. 1–10), is reported at 65 Ill. App. 2d 253, 212 N.E. 2d 694. The decision of the Supreme Court of Illinois, denying leave to appeal without opinion, is unreported.

JURISDICTION

The opinion and order of the Illinois Appellate Court were entered December 9, 1965. Petitioners' timely petition for leave to appeal to the Illinois Su-

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preme Court was denied on March 22, 1966. The petition for a writ of certiorari was filed on June 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

A 1962 amendment to the Trading with the Enemy Act divested the Attorney General of previously vested property which had not become "payable or deliverable to or * * * vested in possession in" him prior to December 31, 1961. Petitioners' remainder interest in a testamentary trust was vested by the Attorney General in 1949, and the interest became distributable under the terms of the trust in 1951, upon the death of the last life tenant. The question presented is whether litigation which subsequently ensued concerning distribution of the trust—which did not terminate until after December 31, 1961—divested the Attorney General under the 1962 amendment.

STATEMENT OF FACTS

In 1949, the Attorney General, acting under the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.*, vested petitioners' remainder interest in a trust created by the will of Louisa Bigelow. 14 Fed. Reg. 1660. In 1951, Sarah de Haven, the last of the three life tenants under the terms of the trust, died (R. 45, 55).[1] Under the terms of the trust, the corpus thereupon became distributable to the children of the life tenants, the class to which petitioners belonged (R. 30–31). Actual distribution, however,

[1] "R." refers to the Abstract of Record in the Appellate Court.

did not occur. Instead, protracted litigation ("the *Orme* case") ensued, as a result of three claims: (1) Petitioners claimed that the Attorney General's vesting order was invalid and that accordingly the remainder should be paid to them; (2) Eugene Orme, claiming under the will of one of the life tenants, urged that the Rule in Shelley's case had vested a fee simple in the trust property in the life tenants, thus destroying petitioners' remainder; (3) Raymond de Haven, who had been adopted by one of the life tenants, claimed the right to share equally with petitioners. The litigation is more fully described in the opinions in *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335, certiorari denied, 343 U.S. 921, and *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E. 2d 505, certiorari denied, 371 U.S. 935.

Public Law 87–846, passed in 1962, provided that interests in various types of property, including trusts, previously vested under the Trading with the Enemy Act, would be returned to their original owners if the interests had not become "payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961." 76 Stat. 1115, 50 U.S.C. App. 41 (Pet. 2). On December 31, 1961, the above described litigation was still in progress; the Attorney General's claim to the remainder interest had been sustained by the chancellor and by the Illinois Appellate Court, and an appeal was pending in the Supreme Court of Illinois. In 1962, the Supreme Court of Illinois affirmed the chancellor's decree, and this Court denied certiorari. *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151,

183 N.E. 2d 505 (1962), certiorari denied, 371 U.S. 935. The chancellor's decree stated that the remainder in question "became distributable to" the Attorney General "upon the death of Sarah de Haven [the last life tenant, who died in 1951]" (R. 136–137).

The chancellor thereafter rejected petitioners' contention that Public Law 87–846 required return of the remainder to petitioners, and ordered distribution of the property to the Attorney General. The Appellate Court affirmed, holding that the remainder interest became payable and deliverable to, and vested in possession in, the Attorney General in 1951, upon the death of the last life tenant:

> The argument of appellants is based on what we consider to be a false premise; namely, that it was the decree in the Orme case which *created* the rights of the various parties. On the contrary, the rights and status of the parties were created by the Bigelow will and were fixed as of the time the last grandchild died. The Orme case so declared. Under common usage, an interest ceases being a remainder or a future interest and becomes a present interest upon termination of the precedent estate. The right of possession and of present enjoyment accrue at that time. The construction of the instrument creating the right may require the aid of a court, and litigation may postpone the actual custody or enjoyment of the right and may be necessary to determine the identity of the holder of the right, but the right of present enjoyment

> is fixed when the precedent estate determines. * * *

(Pet. App. 9). The Supreme Court of Illinois denied leave to appeal.

ARGUMENT

1. As the Illinois Appellate Court held, the Attorney General's right to possession of the trust property here involved accrued in 1951, under the terms of the vesting order and the Bigelow will. It was then that the property became "payable or deliverable to" and "vested in possession in" the Attorney General. The fact that protracted litigation was thereafter necessary to vindicate the Attorney General's property right clearly did not affect the nature of the right or the date on which it accrued.[2]

2. Petitioners' contention (Pet. 17) that the 1962 amendment to the Trading with the Enemy Act "will to a large extent be nullified" by the holding below is incorrect. The holding below simply means that the Attorney General may retain property interests which were due and payable to him on or before December 31, 1961, but which had not been collected because of the pendency of litigation. The purpose of the legislation

[2] An analogy may be drawn to the case of a note which by its terms is payable to John Jones on January 1, 1951. John Jones may find it necessary to engage in years of litigation to vindicate his right to the proceeds of the note. Nevertheless, in common parlance, the note became "payable" to John Jones on January 1, 1951—not on whatever date a court judgment establishing Jones' rights becomes final.